

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 11, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP267

Cir. Ct. No. 2015CV18

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**MARK R. SAMZ, ROBERT M. KEVILUS AND
MICHAEL R. KEGLEY,**

PLAINTIFFS-RESPONDENTS,

V.

**TOWN OF ARGONNE, A WISCONSIN MUNICIPAL
CORPORATION,**

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Forest County:
JAMES R. HABECK, Judge. *Reversed and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Town of Argonne appeals a summary judgment invalidating a resolution it passed concerning snow removal in private driveways. We reverse and remand with directions.

¶2 Argonne had contracted with some of its residents since 1956 for snow removal services from private driveways. In 2014, the town board adopted Resolution No. 07142014, which enunciated its long-standing policy of entering into private driveway snowplowing contracts. During the winter of 2014-15, there were 380 private driveways within the township, and Argonne contracted with approximately 118 private property owners for driveway snow removal. Argonne has never provided snow removal services for private roads or parking lots. The Town has never prevented any business from conducting snow removal operations for township residents.

¶3 Argonne did not use taxpayer money to fund its plowing of private driveways.¹ Argonne's form contract for snowplowing private driveways contained a fee schedule that covered its expenses in providing the snowplowing service. During the winter of 2014-15, Argonne's cost for plowing snow in private drives was approximately \$8,100 and its income for such services was approximately \$9,500. To accomplish snow removal in private drives, Argonne utilized the services of its road crew members, which consisted of two full-time employees and one part-time employee. The crew members operated heavy duty pick-up trucks equipped with a snowplow, and each driveway took approximately fifteen minutes or less to plow. Reduction of its work force would be required if the Town did not provide this service.

¶4 Mark Samz, Robert Kevilus and Michael Kegley (collectively, "Samz") are Town residents engaged in the commercial business of snowplowing.

¹ Argonne also had a winter road maintenance policy stating its discretionary priorities for clearing snow accumulations within its jurisdiction.

Samz commenced a declaratory judgment action seeking to invalidate Argonne's resolution, as well as any future resolutions for snow removal services from private drives. Samz alleged no public interest existed for Argonne's snow removal service from private driveways, "as there are private entities willing and able to perform these duties."

¶5 The parties filed competing motions for summary judgment. During the motion hearing, the parties agreed the facts were not in dispute and urged the circuit court to rule on the issues as a matter of law. In its decision, the court noted contracts to remove snow from private drives were specifically authorized by WIS. STAT. § 86.105 (2015-16).² The court also acknowledged that Argonne's fee for snow removal was such that taxpayer funds were not expended. However, the court concluded Argonne did not provide a public service in removing snow from private driveways. The court stated "you are providing a public service if you can do something that otherwise is not readily available." The court reasoned private entities were able to provide the service within the Town, and "the [T]own [therefore] isn't authorized to do it." The court granted summary judgment in Samz's favor and invalidated Argonne's resolution, as well as "any similar drafted resolution thereafter" Argonne now appeals.³

¶6 We review summary judgment decisions independently, applying the same standards as the circuit court. See *Smith v. Dodgeville Mut. Ins. Co.*,

² References to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

³ Samz notified this court they did not intend to file a responsive brief. Samz's default justifies summary reversal pursuant to WIS. STAT. RULE 809.83(2). In any event, even on the merits we reverse.

212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

¶7 WISCONSIN STAT. § 86.105 grants general powers as follows: “The governing body of any county, town, city or village may enter into contracts to remove snow from private roads and driveways.” Despite this statutory authority, the circuit court concluded Argonne’s contracts violated the public purpose doctrine. Under the public purpose doctrine, public funds may be expended only for public purposes. See *Town of Beloit v. County of Rock*, 2003 WI 8, ¶21, 259 Wis. 2d 37, 657 N.W.2d 344. We will affirm a determination of no public purpose only if it is “clear and palpable” that there can be no benefit to the public. *Id.*, ¶22. If any public purpose can be conceived that might rationally justify the expenditure, the expenditure of public funds is permissible. *Id.* The determination of what constitutes a public purpose is primarily a function of the legislative body and, as such, will not be overruled by a court upon review, except in instances where that determination is “manifestly arbitrary or unreasonable.” *State ex rel. Hammermill Paper Co. v. LaPlante*, 58 Wis. 2d 32, 56, 205 N.W.2d 784 (1973).

¶8 Here, Argonne’s determination of a public purpose in contracting for snow removal from private driveways was not manifestly arbitrary or unreasonable. To the contrary, there was a clear benefit to the public. Argonne’s services enabled access to private driveways for service vehicles such as fire and emergency medical services. Argonne provided ingress and egress after plows clearing town roads placed accumulations of snow into private driveways. This

prevented the hazard of stuck vehicles at the end of driveways and provided citizens with access to schools, health care, groceries and other needs.

¶9 The circuit court improperly relied upon *Heimerl v. Ozaukee County*, 256 Wis. 151, 156, 40 N.W.2d 564 (1949), in concluding Argonne’s private drive snow removal resolution served no public purpose. In that case, the court invalidated WIS. STAT. § 86.106, which authorized municipalities to contract to perform roadwork on private roads and driveways. The court noted the money for the work was raised by a tax levy, even if the ultimate cost to the County was recouped. *Heimerl*, 256 Wis. at 158. The court distinguished this situation from gas, electric, water and other services supported by charges to the users for such services. As the court indicated, “They are not supported by taxes.” *Id.* at 159. The court also noted § 86.106 did not limit itself to private roads and driveways that terminate on public highways. Owners of country estates could have the county constructing and repairing many miles of private roads with no benefit to the public. *Id.* at 158-59.

¶10 Argonne’s plowing of private drives was not supported by taxes. The persons to whom the snowplowing service was rendered prepaid for it, and the burden did not fall on taxpayers generally. Furthermore, there is no evidence in the record that Argonne did not limit its services to private driveways that terminate on public highways, and it has never provided snow removal services for private roads or parking lots.

¶11 *Heimerl* also explicitly distinguished WIS. STAT. § 86.105, the statute involved in the present case. The court stated:

[Section] 86.105 provides that a governing body of any county, town, city, or village may enter into contracts to remove snow from private roads and driveways. It is

common knowledge that when public highways are snowplowed, large amounts of snow are piled into private driveways, thereby creating a greater obstruction than already existed. Then, too, this section is distinguished from sec. 86.106, for the removal of snow is an emergency situation and the public safety of the community in general is directly affected.

¶12 The circuit court’s conclusion in the present case erroneously rested upon a single proposition: Argonne’s resolution would allow it to compete with private entities for snow removal, and no public benefit could exist because private entities within the Town were able to provide snow removal services. However, the *Town of Beloit* decision clarified, “there is nothing in *Heimerl* to suggest that municipalities may never engage in traditionally private business” See *Town of Beloit*, 259 Wis. 2d 37, ¶46.

¶13 Indeed, *Town of Beloit* reviewed Wisconsin case law illustrating the recent trend of Wisconsin courts to liberally apply the concept of public purpose. *Id.*, ¶¶31-35. Numerous instances were discussed in which courts have allowed municipalities to compete with the private sector, even where tax monies were being expended. Examples included municipal financing for industrial development; construction of incinerators and waste disposal facilities; financial aid to the Marquette School of Medicine (now the Medical College of Wisconsin); solid waste recycling; construction of downtown parking areas; and public funds for construction of the new Milwaukee Brewers’ Miller Park. The *Town of Beloit* decision itself authorized the Town to subdivide and sell property. *Id.*, ¶48. Hospitals and health care facilities, nursing homes, and schools are other examples where local governments compete with private entities.

¶14 In addition, an unworkable situation is created by a single test to determine if the public service doctrine is violated based upon whether private

alternatives exist within the community to perform the work. If the validity of the local government's activity is dependent upon the immediate availability of private alternatives, must the local government first perform a survey or other analysis of the availability of such private services before offering them? If so, how often must such a survey or other analysis be conducted to assure the ongoing availability of such services by private entities? The same is true of the court's order declaring invalid "any similar drafted resolution thereafter." Is one survey of alternative private services conclusive forever for "similar" resolutions? In any event, we are unaware of any legal authority for invalidating forever in time "any similar drafted resolution thereafter" based upon the immediate ability of private alternatives to meet the present needs of the community.

¶15 The circuit court also erred by relying upon a website print-out from the League of Municipalities entitled, "Frequently Asked Questions," which referred to an opinion of the Wisconsin Attorney General concluding that only in "exceptional circumstances" would it be permissible for municipalities to plow snow in private drives. *See* 67 Wis. Op. Att'y Gen. 304, 305 (1978). Attorney general opinions, while not binding on the courts, may be persuasive authority. *See State v. Longcore*, 2001 WI App 15, ¶9 n.5, 240 Wis. 2d 429, 623 N.W.2d 201 (2000). However, our independent review of this attorney general opinion reveals it relied principally upon *Heimerl*, and predated the court's liberal application of public purpose in *Town of Beloit*. The League of Municipalities' "Frequently Asked Questions" similarly derived from the attorney general opinion, and also predated *Town of Beloit*. We are not persuaded the attorney general opinion is helpful in resolving the issue presented in the present case under current law.

¶16 Accordingly, we reverse the circuit court's grant of summary judgment in favor of Samz and remand the matter with directions to grant Argonne's motion for summary judgment and dismiss the proceedings.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

